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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Fred G. Earle, husband; and Mary C. Earle,
10 wife,

11 Plaintiffs,

12 v.

13 Bank of America, NA; Mortgage Electronic
14 Registration Systems, Incorporated; First
15 American Title Company; ReconTrust
Company, NA; Government National
Mortgage Association aka Ginnie Mae;
Ginnie Mae II Pool G2 2010 Trust, et al.,

16 Defendants.

No. CV-13-01304-PHX-GMS

ORDER

17 Pending before the Court is Defendants Bank of America, N.A.; Mortgage
18 Electronic Registration System; ReconTrust Company, N.A.; and Ginnie Mae's
19 (collectively "Defendants") Motion to Dismiss. (Doc. 19.) For the following reasons, the
20 Motion is granted.

21 **BACKGROUND**

22 This case arises from a loan secured by Plaintiffs from Defendant Bank of
23 America, N.A., to purchase real property in Yuma, Arizona (the "Property"). (Doc. 1-1
24 (Compl.) ¶ 11.) Plaintiffs evidenced the Loan by executing a promissory note ("Note")
25 and secured the loan with a Deed of Trust ("Deed"). (Compl. ¶ 12.) The Deed names
26 Defendant Mortgage Electronic Registration System, Inc. ("MERS") as the beneficiary
27 and Defendant ReconTrust Company, N.A., as the trustee. (Doc. 19, Ex. D.) Plaintiffs
28 defaulted on the loan. (Compl. ¶ 82.) On August 28, 2012, MERS recorded an

1 assignment of the Deed to Defendant Bank of America, N.A. (Doc. 19, Ex. E.) On April
 2 9, 2013, Defendant ReconTrust recorded a Notice of Trustee Sale, setting a sale date of
 3 July 15, 2013. (*Id.*, Ex. F.) The sale has not yet occurred.

4 On February 21, 2013, Plaintiffs filed the present action in Yuma County Superior
 5 Court. (Doc. 1-1.) Their Complaint alleges ten counts: (1) lack of standing to foreclose;
 6 (2) fraud in the concealment; (3) fraud in the inducement; (4) intentional infliction of
 7 emotional distress; (5) quiet title; (6) slander of title; (7) declaratory relief; (8) violations
 8 of the Truth in Lending Act (TILA); (9) violations of the Real Estate Settlement
 9 Procedure Act (RESPA); and (10) rescission under TILA. (*Id.*) Plaintiffs seek a
 10 declaratory judgment, injunctive relief, equitable relief, and damages. (*Id.*) One June 28,
 11 2013, Defendants removed the action to this Court. (Doc. 1.) Defendants now move to
 12 dismiss Plaintiffs' Complaint on the grounds that they fail to state any claim upon which
 13 relief may be granted. (Doc. 19.)

14 DISCUSSION

15 I. Legal Standard

16 Rule 12(b)(6) is designed to “test the legal sufficiency of a claim.” *Navarro v.*
 17 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim
 18 pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain more than
 19 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action”;
 20 it must contain factual allegations sufficient to “raise a right to relief above the
 21 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a
 22 complaint need not contain detailed factual allegations ... it must plead ‘enough facts to
 23 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,
 24 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has
 25 facial plausibility when the plaintiff pleads factual content that allows the court to draw
 26 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
 27 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility
 28 requires “more than a sheer possibility that a defendant has acted unlawfully.” *Twombly*,

1 550 U.S. at 555. Accordingly, a plaintiff must do more than employ “labels,”
2 “conclusions,” or a “formulaic recitation of the elements of a cause of action.” *Id.*

3 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll
4 allegations of material fact are taken as true and construed in the light most favorable to
5 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,
6 legal conclusions couched as factual allegations are not given a presumption of
7 truthfulness, and “conclusory allegations of law and unwarranted inferences are not
8 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
9 1998).

10 **II. Application**

11 Defendants move to dismiss all of Plaintiffs’ claims on the grounds that each fails
12 to state a claim upon which relief may be granted.

13 **A. Lack of Standing (Claim One)**

14 Plaintiffs first argue that Defendants lack standing to foreclose on the Property
15 because they are not “holders” of the Note. Trustee’s sales in Arizona are governed by
16 Arizona law. Ariz. Rev. Stat. §§ 33-801 to -821. Pursuant to statute, “[b]y virtue of his
17 position, a power of sale is conferred upon the trustee of a trust deed under which the
18 trust property may be sold, in the manner provided in this chapter, after a breach or
19 default in performance of the contract or contracts, for which the trust property is
20 conveyed as security, or a breach or default of the trust deed.” Ariz. Rev. Stat. § 33-
21 807(A). Here, Plaintiffs offer no valid arguments or authority to suggest that, despite this
22 statute, trustee ReconTrust nonetheless lacks authority to foreclose the Property
23 following Plaintiffs’ default or to suggest that any additional “standing” requirements
24 apply. Plaintiffs’ claim that Defendants lack standing to foreclose on the Property is
25 dismissed.

26 **B. Fraud (Claims Two and Three)**

27 Next, Plaintiffs assert both fraud in the concealment and fraud in the inducement.
28 In their first fraud claim, Plaintiffs suggest that Defendants “concealed the fact that the

1 Loans were securitized as well as the terms of the Securitization Agreements” and
2 suggest that Plaintiffs would not have entered into the Loans “had the truth been
3 disclosed.” (Compl. ¶¶ 60, 61.) In their second fraud claim, Plaintiffs assert that
4 “Defendants . . . intentionally misrepresented to Plaintiffs those Defendants were entitled
5 to exercise the power of sale provision contained in the Deed of Trust.” (*Id.* ¶ 68.)

6 Federal Rule of Civil Procedure 9(b) requires that a party “state with particularity
7 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). *See, e.g., Schreiber*
8 *Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (“We
9 have interpreted Rule 9(b) to mean that the pleader must state the time, place, and
10 specific content of the false representations as well as the identities of the parties to the
11 misrepresentation.”) Here, Plaintiffs do not offer any such details. For example, Plaintiffs
12 fail to plead which Defendants were involved in the alleged fraud, how any statements
13 made by any Defendants were false, why Plaintiffs relied on these statements, why any
14 such reliance was reasonable, or how any reliance damaged them. Plaintiffs fraud claims
15 are both dismissed.

16 C. Intentional Infliction of Emotional Distress (Claim Four)

17 Plaintiffs further allege that Defendants’ “fraudulently attempting to foreclose on a
18 property in which they have no right, title or interest” was “undertaken with the specific
19 intent of inflicting emotional distress on the Plaintiffs” and that it has caused such distress
20 to Plaintiffs. (Compl. ¶¶ 74–84.) To state a claim for intentional infliction of emotional
21 distress Plaintiffs must allege three elements: “*first*, the conduct by the defendant must be
22 ‘extreme’ and ‘outrageous’; *second*, the defendant must either intend to cause emotional
23 distress or recklessly disregard the near certainty that such distress will result from his
24 conduct; and *third*, severe emotional distress must indeed occur as a result of defendant’s
25 conduct.” *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580, 585 (Ariz. 1987) (emphasis in
26 original). Plaintiffs’ Complaint does not allege plausible facts to establish any of these
27 elements.

28 Plaintiffs have asserted no basis on which to assert that Defendants have no right,

1 title or interest in the Property. They conclude that Defendants attempted to foreclose the
2 Property in order to intentionally inflict emotional distress “such that Plaintiffs would be
3 so emotionally distressed and debilitated that they would be unable to exercise legal
4 rights in the Property” (Compl. ¶ 79), but they plead no facts to suggest such a plan
5 existed. Plaintiffs do not contest that they are in default on the loan and thus it is not clear
6 how foreclosure constitutes “extreme” or “outrageous” conduct in this case. Further,
7 Plaintiffs state they have experienced distress due to the threat of losing the Property.
8 Plaintiffs also do not explain how the distress caused by the threat of losing the Property
9 was caused by any improper conduct by any of the Defendants as opposed to by
10 Plaintiffs’ own conduct. Plaintiffs fail to state a claim for Intentional Infliction of
11 Emotional Distress, and therefore this claim is also dismissed.

12 **D. Slander of Title (Claim Five)**

13 Plaintiffs next allege that Defendants “disparaged Plaintiffs’ exclusive valid title
14 by and through the preparing, posting, publishing, and recording” of documents including
15 “the Notice of Default, Notice of Trustee’s Sale, and Trustee’s Deed.” (Compl. ¶ 86.)
16 Arizona law creates liability for a person who knowingly causes a false or forged
17 document to be recorded that purports to “claim an interest in, or a lien or encumbrance
18 against, real property.” Ariz. Rev. Stat. § 33-420(a). Here, Plaintiffs do not allege that the
19 listed documents contained any false statements, aside from reasserting, without any
20 plausible facts, that “Defendants had no right, title, or interest in the Property” (Compl. ¶
21 87) despite Plaintiffs’ default. Plaintiffs’ Slander of Title Claim is dismissed.

22 **E. Quiet Title (Claim Six)**

23 Plaintiffs seek to quiet title to the Property. (Compl. ¶¶ 93–95.) Under Arizona
24 law, title cannot be quieted unless Plaintiffs pay off the full amount of the mortgage.
25 *Bean v. BAC Home Loans Servicing, L.P.*, 11–CV–553–PHX–GMS, 2012 WL 10349, at
26 *5 (D. Ariz. Jan. 3, 2012) (citing *Farrell v. West*, 57 Ariz. 490, 491, 114 P.2d 910, 911
27 (1941) (“[I]f it appears there is an unsatisfied balance due a defendant-mortgagee, or his
28 assignee, the court will not quiet the title until and unless [the plaintiff-mortgagor] pays

1 off such mortgage lien.”)); *Eason v. Indymac Bank*, 2010 WL 1962309, at *2 (D. Ariz.
2 May 14, 2010) (“[Q]uiet title is not a remedy available to the trustor until the debt is paid
3 or tendered.”).

4 Plaintiffs do not allege that they have tendered the full amount of the mortgage nor
5 that they are “ready, willing and able” to do so. *Eason*, 2010 WL 1962309, at *2. As
6 such, they cannot bring an action for quiet title. This claim is dismissed.

7 **F. Declaratory Relief (Claim Seven)**

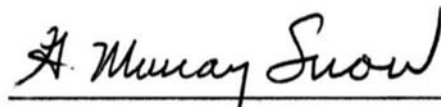
8 Plaintiffs next “request a judicial determination of the rights, obligations and
9 interest of the parties with regard to the Property.” (Compl. ¶ 100.) Defendants assert that
10 Plaintiffs are not entitled to declaratory relief because they have stated no basis upon
11 which relief may be granted. The Court agrees. Plaintiffs’ claim for declaratory relief is
12 dismissed.

13 **G. TILA and RESPA (Claims Eight, Nine, and Ten)**

14 Plaintiffs concede that their TILA and RESPA claims are time-barred. Thus, these
15 claims are also dismissed.

16 **IT IS THEREFORE ORDERED** that Defendants’ Motion to Dismiss (Doc. 19)
17 is **granted**. The Clerk of Court is directed to terminate this action and enter judgment
18 accordingly.

19 Dated this 1st day of May, 2014.

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22 _____
23 G. Murray Snow
24 United States District Judge
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